Clock Electric, Inc. *and* International Brotherhood of Electrical Workers, Local No. 38. Cases 8–CA–26560 and 8–CA–26646

July 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issues presented for Board review are whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicants Richard J. Crumbley and James Embrescia because of their union support, and that the Respondent violated Section 8(a)(1) of the Act by engaging in photographic surveillance of protected concerted employee picketing.[1] The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Clock Electric, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On March 27, 1997, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Richard F. Mack, Esq., for the General Counsel.
Jon R. Steen, Esq., and *Rebecca M. Gerson, Esq.*, of Boardman, Ohio, for the Respondent.
Bryan O'Connor, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Cleveland, Ohio, on September 12–13 and October 8, 1996. The charge in Case 8–CA–26560 was filed on July 21, 1994, by the International Brotherhood of Electrical Workers, Local No. 38 (the Union or Local 38). The charge in Case 8–CA–26646 was filed by the Union on August 18, 1994, and was subsequently amended on September 29, 1994.[1] A consolidated complaint and notice of hearing was issued on March 26, 1996, alleging that the Company violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, is an electrical contractor with an office and place of business in Cleveland, Ohio. During the 12-month period preceding September 12, 1996, it purchased and received at its Cleveland, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Company also admits and I find that at all relevant times the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The primary issues are: (1) whether the Company, through Jim Bratsch, field operation manager, and Lisa Clock, vice president, on or about July 11, 12, and/or 13, unlawfully interrogated employee Orin L. Lemin Jr.[3] about the identity of other employees purportedly seeking a wage increase; (2) whether on July 15, the Company, through Alan Conn, project manager, unlawfully interfered with employee's union and protected activities by photographing Orin Lemin and certain union agents picketing at a jobsite; (3) whether the Company refused to hire Richard J. Crumbley, James Embrescia, and Jerry Gershen between May 15 and 25, because of their union membership; (4) whether the Company between June 1 and August 3, reprimanded Orin Lemin and critically evaluated his work performance because of his union membership and protected activity; and (5) whether Orin L. Lemin Jr. was laid off and eventually discharged because of his union membership and protected activity.

B. *Facts*

The Company is a nonunion electrical contractor, which has operated in the Greater Cleveland area for approximately 24 years. It is principally owned and run by Charles Clock (Chuck or Chuck Clock), the Company's president, who was an electrician for 15 years before going into business for himself. Chuck Clock's daughter, Lisa Clock (Lisa), is the Company's office manager, who performs several

[1] All dates are in 1994, unless otherwise indicated.

[2] The Respondent's unopposed motion to correct the transcript is granted.

[3] In the complaint and in its brief, the General Counsel incorrectly refers to Lemin as "Orin F. Lemin Jr." According to the individual's testimony, and other corroborating evidence, his correct name is "Orin L. Lemin Jr."

adminstrative duties, including overseeing the Company's hiring process. Jim Bratsch was the Company's field operations manager, responsible for overseeing jobsite work. He also reviewed employment applications and interviewed prospective employees. Although Lisa and Bratsch made recommendations about who to hire, the ultimate decision to hire was almost exclusively made by Chuck Clock.

In May 1994, the Company placed an advertisement in a local newspaper seeking to hire two journeymen electricians. When the Union learned that the Company was hiring, Business Representative Al Baskin asked five union members, who were out of work, to apply for the jobs in an effort to organize the Company.

1. The overt union member applicants

The first three union members who applied did not attempt to conceal their union affliliation. Richard J. Crumbley and James Embrescia wore jackets with the union logo, when they applied on May 16 and 17, respectively. Lisa Clock gave them applications which they completed in the Company's reception area. Crumbley had 13 years' experience as a journeyman electrician. His application reflected that he attended a 4-year apprenticeship program at the Max S. Hayes Trade School, a union-affliated school. It listed past employment with several contractors, known to Chuck Clock as union contractors, and disclosed that he was last paid at the rate of $23.48, which was the union rate applicable at the time. Embrescia had approximately 8 years' experience as a journeyman electrician. His application reflected that he attended a 4-year "IBEW/NCEA Joint Apprenticeship" program. It likewise indicated that he had worked for several contractors known to Chuck Clock as union contractors[4] and that he also was last paid at the union rate of $23.48. Both men scored reasonably well on a written electrical test given by Lisa Clock. Crumbley got 15 of 19 questions correct. Embrescia correctly answered 13 of 19 questions. When they turned in their applications, Lisa Clock told both men that they would be contacted to set up an interview.[5]

Neither individual was ever called by Lisa Clock nor anyone else at the Company. Embrescia, however, took the initiative to call Lisa Clock on May 25 and a few times thereafter to inquire about the status of his application. Each time he was told to call back later because hiring had been placed on hold. On June 10, Embrescia went to the Company's office to fill out a new application, because he thought that his original application would be discarded after 30 days. Lisa Clock told him that there was no need to reapply, because the Company was not hiring.

In the meantime, Joe Gelski, a nonunion journeyman electrician, applied on May 17. He had worked sometime in the past for a customer of the Company and was recommended by its owner. In the course of that employment, Gelski had met Chuck Clock and worked along side some of the Company's electricians. Gelski performed well on the electrical test correctly answering 16 of 19 questions. Gelski was hired on May 19, leaving vacant only one of the jobs advertised.

On May 24 and 25, two more union members applied for employment with the Company. Jerry Gershen, an overt union applicant, applied on May 25.[6] He had been a journeyman electrician for 22 years. His application disclosed that he had completed a 4-year apprenticeship with IBEW, Local 38. He previously had worked for several contractors, also known to Chuck Clock as union contractors and was last paid at the rate of $23.45. Although Gershen did exceedingly well on the written electrical test by correctly answering 17 of 19 questions, he did not present well on the day that he applied. Earlier that day, he spent a couple of hours doing electrical work at a friend's house. When he arrived at the Company, his hair was matted, his clothing was soiled and he exuded a malodorous body odor. A smell similiar to alcohol was detected on his breath. Although Lisa Clock accepted his application, he was told that the Company was not hiring.

2. The hiring of covert union member, Orin L. Lemin Jr.

On May 24, Orin Lemin applied as a covert union applicant. He did not reveal that he was a Local 38 member or wear any clothing which would suggest the same. Lemin's application was largely fabricated. Although it accurately reflected that he had been a journeyman electrician for approximately 3 years, it listed three small nonunion contractors for whom Lemin had never worked and stated that his last paid wage was $10.25 per hour, which was less than half the union rate. Lemin correctly answered 15 of 19 questions on the written electrical test.

3. The events which occurred before Lemin revealed his union affiliation

Lemin was told that although the Company had hired all the men that were needed for now, his application would be kept on file. By the time he got home; however, there was a voice message from Lisa Clock asking him to call for an interview. The next day Lemin met with Bratsch. About 10 minutes into the interview, Bratsch offered Lemin a job starting at $10 an hour with a wage review after 30 days. After quibbling about the wage rate, Lemin accepted. Lisa Clock went over some personnel matters with Lemin and gave him a copy of the employee handbook. In the course of their conversation, Lemin asked Lisa whether the Company would consider hiring anyone who Lemin referred. Lisa told Lemin that the Company was not hiring, but if he referred someone who mentioned his name that person would be considered for employment.

Lemin began work on June 1 at the Baldwin-Wallace jobsite doing demolition work. His immediate supervisor was

[4] Chuck Clock testified that he recognized some of the contractors listed on both applications as union contractors. The evidence also suggests that he knew that the Max S. Hayes Trade School was a union apprenticeship program.

[5] The third overt union member was Frank Krist, who applied on May 18. Because he did not pass the written electrical test, he was not named as an alleged discriminatee in the complaint.

[6] Gershen testified that when he applied for a job with the Company he was wearing a hat with a union logo. In an earlier affidavit, he stated that he was wearing a union jacket, but made no mention of a hat. When asked at the hearing to explain the discrepancy, Gershen appeared confused and unsure which of the two items, if any, he wore on May 25. Lisa Clock and Jim Bratsch observed Gershen when he made application. Both testified that he wore neither a hat nor a union jacket. I credit their testimonies over that of Gershen on this point.

Bill Sevcheck. Somewhere between June 6 and 10, he phoned Lisa Clock asking her if she would accept an application from a friend named Mike Tallon, who was an experienced electrician. Lisa told Lemin that the Company was not hiring. However, if the friend mentioned Lemin by name, his application would be accepted. Otherwise it would not. According to Lemin, Lisa cautioned him: "Don't ask me why."

On June 10, Local 38 sent Mike Tallon, another union member, to apply covertly for a job. Tallon mentioned Lemin's name, completed an application, but did not reveal his union membership. His application also was largely fabricated. It reflected 4 years' of trade school and 11 years' experience at the journeyman level. In reality, Tallon had 7 years' experience as a journeyman. He listed past employment with three small contractors over an 11-year period making $12 an hour on his last job. Tallon answered 14 of 19 questions correctly on the electrical test. When he completed the electrical test, he was interviewed by Chuck Clock.

Chuck told Tallon that the Company was very busy and needed to hire electricians. In reviewing Tallon's resume, Chuck noted that Tallon had attended the Max S. Hayes Trade School, which prompted him to ask Tallon whether it was a training school for Local 38. Tallon stated that he was not familiar with Local 38 and that he attended a day program at Max S. Hayes. Tallon was not offered a job at the end of the interview. However, Chuck subsequently directed his daughter Lisa to set up a second interview with Tallon. She unsuccessfully attempted twice to phone Tallon leaving a message on his answering machine for him to call. Tallon did not receive either message and had no further contact with the Company.

In the meantime, Lemin continued working at Baldwin-Wallace. On June 14, he asked the Field Superintendent Jim Bratsch about getting a wage increase. Bratsch told him that he would think about it.[7] A few days later on June 21, Lemin again unsuccessfully asked Bratsch about a wage increase.

On June 24, Lemin was sent to the B. F. Goodrich project, where he worked 11 days under the supervision of Alan Conn, project foreman. During this time, Conn told Bratsch that Lemin needed prodding to complete his work. On July 5, he returned to Baldwin-Wallace for 1 day, where he again asked Bratsch for a pay raise. Bratsch told Lemin that based on Conn's comments, he would not be getting a pay raised unless he started doing more work.[8]

The next day, July 6, Lemin returned to the B. F. Goodrich project. Reporting to work early, he went to see Conn at about 7:20 a.m. to ask him about the comments attributed to him by Bratsch. Conn acknowledged what he had said to Bratsch, and told Lemin that if he wanted more money, he would have to improve his attitude and work harder. Lemin sought Conn's assurance that he was not going to be laid off, which he received.

Later that day, when the crew took their morning break, John Benusik, an apprentice, noticed a Local 38 sticker on Lemin's lunchbox. He asked Lemin if he had once belonged to the Union to which Lemin responded, "I still do." In the presence of Conn, Lemin explained that he was there to "organize the unorganized." The next day, July 7, Lemin also wore a Local 38 shirt to work[9] and started talking about the Union to the other employees.

4. The events which occurred after Lemin revealed his union affiliation

On July 8, Lemin distributed literature containing the union pay rate and benefit information. When he attempted to engage Conn and a couple of employees in a discussion about the union pay scale, he was interrupted by Bob Norfolk, a journeyman electrician, who formally had belonged to Local 38. Norfolk was not a union supporter and much to Lemin's chagrin, he proceeded to share his views with everyone present.

At the B. F. Goodrich project, weekly meetings were held by the contractor with each subcontractor and its employees to review safety issues and other concerns. On July 8, such a meeting was attended by Lemin during which everyone was instructed to stay out of a restricted area on the east side of building R. Immediately after that meeting, Conn attended a supervisors' meeting in the contractor's trailer. Sitting by a window, he saw Lemin leave the building in which he was working and enter the restricted area building. Minutes later Conn saw Lemin leave the restricted area building to return to his job. When Conn spoke to him about entering the restricted area, Lemin gave no explanation for entering the restricted area. A few days later, Lemin was given a written disciplinary warning for entering a restricted area, after being instructed to stay out of the area. He signed the written disciplinary warning without any objection.

On July 12, Lemin spoke with Lisa Clock about a pay increase, after unsuccessfully attempting to contact Bratsch first. He purportedly told Lisa that he wanted a pay raise for himself and the men who wanted to be represented by the Union.[10] She told him that his pay increase would be discussed when he received his 30-day evaluation. According to Lisa Clock, Lemin became very rude on the phone and the conversation ended.

The next day, Lemin spoke with Bratsch telling him that he wanted a pay increase for himself and "the guys." Lemin recalled Bratsch asking who were the other men. Bratsch recalled telling Lemin to worry about himself and not others. He testified that he never asked who were the other men.

[7] A notation in Sevchek's foreman log for June 15 discloses that Lemin "was told to pick up the pace as far as his productivity on the job." Lemin did not recall Sevchek ever telling him that he needed to work faster. The Charging Party implies that the notation in the foreman's log, which came 1 day after Lemin requested a pay increase, is evidence of antiunion animus. I do not agree. Ample evidence demonstrates that Lemin did not reveal his union affiliation until early July 1994. Because there is no evidence that the Company knew of Lemin's union activity at the time the notation purportedly was made, I cannot conclude that it was motivated by antiunion animus.

[8] Bratsch remembered having only one conversation with Lemin about a wage increase on or about July 13. Lemin's daily logs, however, support his testimony that he spoke with Bratsch about a pay raise on several occasions. I credit Lemin's testimony on this point.

[9] Before leaving work on July 7, Lemin was asked to contact Lisa Clock about signing a receipt for his employee handbook. The receipt, among other things, acknowledged that either the Company or Lemin could terminate his employment at any time with or without cause.

[10] Lisa Clock testified that she did not recall Lemin mentioning a pay raise for anyone else.

Lemin did not receive a pay increase. Rather, on July 14, Bratsch handed him a 30-day performance evaluation, dated July 6, 1994. The overall rating was slightly less than fair, despite ratings of fair or above in 16 of 18 rated categories. Lemin was rated unsatisfactory in quantity of work and safety awareness/precautions. In terms of safety and productivity, he was admonished for leaving charged wires uncapped on the B. F. Goodrich project and for working slower than the industry standard.[11] In a space at the bottom for comments, Lemin wrote that he felt the evaluation was unfair and "that there is favoritism towards long time nonunion [Company] employees."

The day after Lemin received his performance evaluation the Union picketed the B. F. Goodrich jobsite. Lemin, Business Representative Al Baskin, and another union agent picketed before the morning shift started and during the lunchbreak. When Conn reported the picketing to the Company's front office, he was told to get a photograph of the picket signs. At lunchtime, he drove up to the pickets with a camera, snapped a picture of Lemin, and drove off. Lemin was holding a sign which read, "Clock Electric Turns Back The Clock On Fair Wages And Benefits."

The next day Lemin was sent to rewire a machine at Apex Box. After that he spent several days working at the Industrial Plastics jobsite, where he explained the benefits of joining the Union to the other workers. Lemin did not make a good first impression on Dave Gunsalus, the project manager at Industrial Plastics. In the first few days on the job, Gunsalus repeatedly reminded Lemin to wear his safety glasses and had to redo some of his work because Lemin had installed circuit breakers out of order and had installed an outlet upside down. Gunsalus also thought that Lemin worked slowly, that his pipe bending skills were poor, and that his attitude was lax. Gunsalus also was not impressed by Lemin's union rhetoric which caused him to needle Lemin about the quality and quantity of union-trained journeyman.

When the Industrial Plastics job slowed down, Lemin was transferred to Alcon Industries, where he worked with Foreman Dean Bratsch, the brother of Jim Bratsch. In the early morning of August 3, Kay Mullins, Alcon's human resources director, received a phone call from a secretary telling her that an unidentified man was in the manufacturing shop, an area restricted to Alcon employees only. When Mullins arrived at the restricted area, she found Lemin, who identified himself as a Clock Electric employee. She told him that he was in a restricted area, and asked him to leave.

A short time later, Mullins received another phone call telling her that picketing, directed against Clock Electric, was taking place outside the building. After speaking with the Company's attorney, a reserved gate was established and Clock Electric was ordered off the job. At that point, it was reported to Mullins that an unidentified person was in the manufacturing area again. To her surprise, it was Lemin again. Mullins became quite annoyed. Not only had she told Lemin to stay out of the area earlier that day, he also should have left the premises when the Company was ordered off the job. Again Mullins told Lemin to leave, whereupon he went outside to the picket. A few minutes later, Mullins saw Lemin standing outside with a picket sign and for the first time she realized that he was involved with the picketing.

The Company was not allowed to return to Alcon to finish the job. Alcon instead chose to complete the work using in-house electricians and another subcontractor. Mullins was particularly upset by the fact that the Company was unable to control its employee, i.e., Lemin, who twice was asked to leave a restricted area.

In the meantime, Lemin and Dean Bratsch were sent home for the rest of the day. The following morning, Jim Bratsch called Lemin to see if he had a fire alarm license, which he did not. Jim Bratsch told Lemin that the only work available required a journeyman with a fire alarm license and therefore he was being laid off until something else came up. Dean Bratsch was also laid off because he did not have a fire alarm license.

As a followup to the August 3 incident, Mullin wrote a letter to Chuck Clock on August 12 expressing her displeasure with Lemin's behavior, that is, going into restricted areas unaccompanied and failing to leave the premises when asked to do so. On August 23, Lisa Clock phoned Lemin ostensibly to discuss with him the events that occurred on August 3. Although Lemin denied being in a restricted area, Lisa advised him that he was terminated. She followed up the phone call with a termination letter that day.

C. *Analysis and Findings*

1. The alleged unlawful interrogation of Lemin

The complaint alleges that "on or about July 11, 12 and 13, 1994, Respondent, by Jim Bratsch and Lisa Clock, unlawfully interrogated an employee [Lemin] about employees protected concerted activities." Relying exclusively on Lemin's testimony, the General Counsel asserts that Lemin spoke separately with Lisa and Bratsch on the above dates about getting a pay increase for himself and "the guys," and in each conversation he was asked several times to identify who were the other men. Lisa Clock testified that she did not recall any reference to "other men" in her telephone conversation with Lemin, and Bratsch flatly denied that he ever asked Lemin to tell him who were "the guys." I credit Lisa Clock and Bratsch for several reasons.

Lemin kept a written daily log of his activities with the Company, which, among other things, contains the substance of conversations with coworkers, foremen, and other company officials. It also describes various activities thought by Lemin to constitute unfair labor practices. Although the log reflects that Lemin spoke with Lisa and Bratsch about a pay raise on July 11 and 12, respectively, and that he asked Lisa for a pay raise for himself and "the men," nowhere does it mention that Lemin was questioned by either Lisa or Brattsch about the identity of the other men.[12] Instead, the

[11] The performance evaluation notably did not reference the July 11 written warning given to Lemin for entering the restricted area on July 8. This omission suggests that the 30-day evaluation was, in fact, prepared on July 6, even though it was not given to Lemin until July 14.

[12] The daily log reflects, and Lemin testified, that he secretly taped many of his conversations with Lisa Clock and Jim Bratsch. A transcribed segment of a tape made on May 25, as well as the original tape, were admitted into evidence to impeach the testimony of Lisa and Bratsch concerning the hiring of Lemin. However, no such transcription was offered to corroborate Lemin's testimony or impeach

Continued

log reflects that Lisa "would not comment" on the pay raise. In addition, Lemin gave two affidavits in the course of the General Counsel's investigation. Neither affidavit mentions any facts which corroborate Lemin's testimony that he was questioned about the identity of the other men. Absent evidence corroborating Lemin's recent version of what was discussed, I shall recommend that the allegation of interrogation be dismissed.[13]

2. The photographing of pickets

It is settled Board law "that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *F. W. Woolworth Co.*, 310 NLRB 1197 (1992), citing *Waco, Inc.*, 273 NLRB 746, 747 (1984). It is undisputed that Foreman Conn took a photograph of Lemin holding a picket sign on or about July 15. The Company seeks to justify its conduct by asserting that in the past it has been subjected to unlawful picketing on many occasions and, therefore, has instructed its foremen, as a matter of course, to photograph the picketing in an effort to prove unlawful activity. While that may be its practice, there is no evidence in this case that the picketing on July 15 was unlawful or thought to be unlawful or was in any other way improper. Stated otherwise, there was no legal justification for taking the photograph. *Sonomo Mission Inn & Spa*, 322 NLRB 898 (1997). The Company also asserts that Lemin was a paid union organizer and therefore taking his photograph was less likely to intimidate and interfere with an employee's right to engage in protected activity. The Company does not cite any authority in support of its argument, which basically ignores the fact that Lemin was an employee of the Company, even though he was a paid union organizer. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). Accordingly, I find that the Company violated Section 8(a)(1) of the Act by photographing Lemin on the picket line on July 15.

3. The refusal to hire Crumbley, Embrescia, and Gershen

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[14] In a refusal to hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, who harbored antiunion animus, and who refused to hire the alleged discriminatee because of that animus. *Big E's Foodland*, 242 NLRB 963, 968 (1979). Inferences of animus may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T&J Trucking Co.*, 316 NLRB 771 (1995).

a. *Company knowledge of the applicants' union membership and its related union animus*

There is no dispute that Crumbley, Embrescia, and Gershen all submitted applications to the Company, that all were union members, and that none was hired. The first issue, therefore, is whether the Company was aware or suspected that they were union members, when it declined to hire him. The evidence establishes that the entries on their respective application forms sufficiently notified the Company that they all belonged to the Union. On their applications, Embrescia and Gershen listed that they had attended the IBEW apprenticeship school. Crumbley similarly noted completing his apprenticeship at the Max S. Hayes Trade School, which the unrebutted evidence establishes was recognized by Chuck Clock as a union affiliated trade school. All three applicants were last paid at the union wage rate, which was significantly higher than the rate paid by nonunion companies, and all had worked for union contractors in the past. In addition, the credible evidence discloses that when Crumbley and Embrescia applied, they were wearing a hat or a jacket with a union insignia, which served to alert the Company that they were union members.[15]

Importantly, Chuck Clock, who ultimately approved all hiring decisions, testified that he recognized some of the contractors on the respective applications as union contractors and even suspected that Embrescia was a salt at the time he applied. Although he testified that he did not know what the union wage rate was under the collective-bargaining agreement, Chuck acknowledged that he knew that the union wage rate was substantially higher than the rate paid by the Company, and that it was akin to the wage rate paid by the Company when it worked a prevailing wage rate job. The evidence therefore establishes that the Company, by and through Chuck Clock, was aware or had reason to suspect that all three applicants were union members.

Credible evidence also exists of antiunion animus. Of the 13 applicants, who the Company identified as responding to

either Lisa or Bratsch in connection with the alleged interrogation. The absence of the transcription warrants an adverse inference that the tape would not have supported Lemin's version of the telephone conversations.

[13] My recommendation would be unchanged even if the evidence had established that Lisa and/or Bratsch had asked Lemin to identify the "other men." Assuming it was asked, the question was presented in the course of a casual telephone conversation with Lemin, an open and active union supporter. In my judgment, it was a natural response to Lemin's request for a pay raise for himself and others, to inquire into who he was speaking for, and it was not part of any pattern of interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985); see also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[14] *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

[15] With respect to what clothing, if anything, Gershen wore with a union logo, the evidence is less than clear. Although his affidavit states that he wore a union jacket, Gershen denied wearing a jacket, and instead he testified that he wore a union hat. On further reflection, he was unsure what he wore on the day he applied. In contrast, both Lisa Clock and Jim Bratsch stated that Gershen did not wear anything containing a union logo when they observed him completing an application. I, therefore, credit their testimonies.

its May 1994 advertisement,[16] only Crumbley, Embrescia, and Gershen were not called for an interview or attempted to be contacted for such purpose.[17] See *Fluor Daniel, Inc.*, supra. In contrast, the Company attempted to contact nonunion applicant, John Yonek, for an interview, even though he had been fired from his last job and attempted to call covert applicant, Mike Tallon, for a second interview, even though the Company purportedly was not hiring.

Not only were the three union member applicants not contacted for an interview, two were told that the Company was no longer hiring, at a time when it still was actively seeking to hire other journeymen electricians. After being put off several times by Lisa Clock, Embrescia was told on June 10 that the Company was no longer hiring. On the same day, however, union member Mike Tallon covertly applied and was interviewed, after mentioning Lemin's name when he applied. While Lisa Clock denied ever telling Lemin that anyone who used his name would be considered for employment, her testimony in this regard is discredited by ample evidence, including part of a transcript of a tape recording made at Lemin's May 25 interview, when she told Lemin to make sure that his friends mentioned his name when they came in to apply. Lemin credibly testified that Lisa told him the same thing shortly before Tallon applied. As it turned out, Tallon was immediately interviewed on June 10, while Embrescia who had diligently followed up on his application, was told that the Company was no longer hiring. Jerry Gershen likewise was told the same thing on May 25, the very same day that Lemin applied. If nothing else, this evidence shows that the Company was carefully screening the applicants and discouraging those suspected of being union members, while pursuing those who appeared to be not affiliated with a union.

In an effort to offset the evidence which supports an inference of animus, the Company asserts that it has hired union members in the past, namely, Robert Dunfrey, Robert Norfolk, and John Cronin. The Company's argument is not particularly persuasive. None of these individuals belonged to a union at the time he was hired. Dunfrey had dropped out of the Union and was in business for himself when he was hired by the Company. Likewise, Norfolk had not been a union member for over 10 years when he began working for the Company. Cronin had never belonged to the Union. In his interview with Chuck Clock, he expressed the hope of getting into the union apprenticeship program some day and discussed with Chuck Clock how difficult it was to get admitted to the program. Chuck Clock testified that despite Cronin's interest in the Union he hired him anyway. There is significant difference, however, between hiring someone who belonged to the Union in the past or hoped for the opportunity to join, and hiring an active union member, who seeks to organize the rest of the work force.

The Company likewise points to the layoff and recall of Kenneth Criss in an attempt to show the absence of animus. After Criss was laid off in mid-July, he openly solicited signature cards on behalf of the Union. The Company asserts that it did not know that Criss was a union supporter at the time of the layoff and that it nevertheless recalled him after he revealed his union affiliation. Review of the evidence, however, establishes that Criss was not recalled until after the Union filed the first unfair labor practice charge in this case. Moreover, Chuck Clock's explanation of why Criss was selected for layoff in the first place raises suspicion about what the Company actually knew about his union involvement and when it was known. When Chuck Clock was asked why Criss was selected for layoff even though he had been employed longer than new hires Gelski and Lemin, Chuck said that Criss was selected for layoff because Gelski had more experience than Criss and he could run a job. The evidence, however, shows just the opposite. Criss had more journeyman experience than Gelski, had completed a 3-year apprenticeship, unlike Gelski, and had some leadership skills after serving 4 years as a lance corporal in the U.S. Marines. Chuck Clock also said that Criss was selected for layoff because he had an attendance problem. In earlier testimony, however, Chuck testified that Criss was recalled from layoff because he was a good electrician. These seemingly inconsistent statements and the timing of the recall soon after the unfair labor practice was filed raises some doubt about the Company's true motives for the layoff and recall of Criss, and does nothing to offset the General Counsel's evidence of animus.

Accordingly, I find that the General Counsel has satisfied his initial burden of persuasively establishing that the alleged discriminatees were not hired because of their union membership. The Respondent must now persuasively establish that its hiring decisions would have been the same in the absence of union membership.

b. *The Company's defenses*

(1) Richard J. Crumbley and James Embrescia

The Company asserts that its hiring decisions were based on lawful criteria including, among other things, skill, experience, employment history, appearance, test results, and earnings' history. Applying this criteria, the Company contends that it hired the best person available, Joe Gelski, over Crumbley and Embrescia because he scored higher on the written electrical test and because he had a comparatively stable employment history at a wage rate in keeping with the wage that the Company was offering. The Company also argues that it sought to hire employees who would stay 5 years or longer and that its past experience demonstrated that individuals, like Crumbley and Embrescia, who took a pay cut to work for the Company left before too long to take better paying jobs.

The Company's arguments are unpersuasive for several reasons. To begin with Gelski scored only one point higher than Crumbley on the electrical test. While he scored three points better than Embrescia, the evidence establishes that both Crumbley and Embrescia individually had several more years of experience than Gelski. Crumbley graduated from high school, completed a 4-year apprenticeship, was licensed for fire alarms, and had worked 9 years as a journeyman electrician. Embrescia graduated from high school, completed a 4-year apprenticeship, and had worked 4 years as a journeyman. Gelski on the other hand did not complete high school or an apprenticeship program. At the time he applied

[16] Steve Barrett, Irving Maldonado, Robert Pahler, Steve Makupson, James Ryan, Richard Crumbley, James Embrescia, Joseph Gelski, John Yonek, Frank Krist, Robert Hilton, Orin Lemin, and Jerry Gershen. R. r. 5.

[17] Similarly, no attempt was made to contact, Frank Krist, the other union member who did not pass the written electrical test.

he was still taking electrical classes and had worked only 4-1/2 years doing electrical work. The evidence, therefore, reflects that Gelski's practical knowledge and experience paled in comparison to that of Crumbley and Embrescia.

In addition, Gelski's work history was no better than that of Crumbley or Embrescia during the 2-year period prior to application. All three worked three jobs in 2 years. Embrescia's work history appeared to be worse than the other two because, unlike Gelski and Crumbley, he listed his employment history going back 8 years, which included several jobs that he had as a union apprentice. The credible evidence establishes, however, that union apprentices are typically moved from job to job in order to provide a broader range of experience, which was a fact known to Chuck Clock. Focusing on the same 2-year work period for all three applicants, the evidence establishes that all three work histories were comparable in terms of stability.

The evidence also falls short of showing that applicants who take a pay cut are likely to leave for higher paying jobs relatively soon. The Company introduced evidence showing that between January 1, 1989, through May 1994, only five individuals, hired by the Company for less money than they previously made, left within a few months purportedly for a better paying job.[18] That is all of the evidence which the Company tendered to support its argument. Other evidence notably reflects that the Company's unwritten policy against hiring someone who would have to take a pay cut was not uniformly followed and that not everyone who took a signficant pay cut to work with the Company left within a few months. For example, James Mackle, who was hired at $10.50 per hour after making $15 per hour, was still working for the Company at the time of the hearing. Significantly, he was hired in April 1994, only a few weeks before Crumbley and Embrescia were denied employment, even though he had to take a significant cut in pay and even though he did not pass the electrical test. The Company also sought to arrange an interview with John Yonek, who would have had to take a $2 pay cut and who had been fired from his previous job. The inconsistent application of the unwritten rule supports the view that this reason for not hiring Crumbley and Embrescia was pretextual. To be certain, the evidence establishes that several employees hired between April-June 1994, who did not take a pay cut or took only a slight pay cut to work for the Company, nevertheless quit anyway within a few months.[19] Thus, no conclusive evidence exists to support the Company's high wage defense.

The Company also argues in its brief at pages 9–10, that Crumbley and Embrescia were not hired because their wage histories suggested that they would want wages far beyond what the Company could afford to pay.[20] Although it does not cite *Wireways, Inc.*, 309 NLRB 245 (1992), in support of its position, the General Counsel points out, and I tend to agree, that the Company's argument is structured on *Wireways, Inc.* There, evidence was presented showing that the employer routinely budgeted X number of dollars and Y number of man-hours for each project and that it tried to hire qualified employees within the budget for each project. According to the employer's project manager in that case, he would cull through applications trying to match experience and desired wages or wage histories to the project. In his view, "If he offered an employee a job at less wages than the employee was accustomed to receiving, the employee would be either less productive or would leave for the first job paying more. He therefore, as a rule, [did] not call skilled applicants who [listed] higher desired wages and offer them work at lesser wages." Id. at 250. The Board concluded that although the General Counsel had carried its initial burden, the respondent had adequately rebutted the evidence of unlawful motive by demonstrating that the applicants were not hired because they all had sought, or had previously earned, wages that clearly exceeded the budgeted wages the respondent was offering.

Wireways, Inc., supra, and the present case are factually distinguishable. Here, there is no evidence that the Company's hiring decisions were made with a view toward staying within budget limits. Also, the General Counsel here, unlike in *Wireways, Inc.*, has submitted evidence showing that there is no clear basis for the policy because employees who did not take a pay cut to work with the Company also quit after a few months, while at least one employee who took a signficant pay cut still works for the Company.

The only remaining factor that distinguishes Gelski from Crumbley and Embrescia is the recommendation that Gelski received from Hank Schwartz, a longtime client of the Company. That the Company would seek to hire an applicant commended to it by a well-known source is understandable, but that standing alone is not enough to tip the scales in Gelski's favor. Perhaps recognizing that fact the Company also argues that Gelski was hired because his skills were well known to the Company. Chuck Clock testified that Gelski's skills were personally known to him after having observed Gelski doing electrician's work alongside the Company's electricians over a period of 1-1/2 years. However, Gelski's testimony did not exactly corroborate Chuck Clock's statement. Rather, Gelski said that when he worked for Hank Schwartz, he met Chuck Clock and a few of his employees. Occasionally, if they needed an electrical part he would get it for them or if they needed a hand pulling wire he would help. In contrast to Chuck Clock, however, Gelski estimated that this occurred over a period of a couple of weeks. Gelski appeared forthright. I credit his testimony which tends to show that the scope and depth of his contact with Chuck Clock and his employees, as well as his electrical experience, was much less than Chuck Clock stated it to be.

The evidence, therefore, establishes that, other than a personal recommendation, there was no lawful reason for the Company to select Gelski over Crumbley and Embrescia. I

[18] George Tocharchick was hired at $12.50 per hour after making $13.25 per hour; Jay Steiner was hired at $8 per hour after making $13.05 per hour; Jay Grant was hired at $12 per hour after making $17 per hour as a foreman; Kelly Child was hired at $11.50 per hour after making $14.50 per hour; and Frank Brooks was hired at $12 per hour after making $17 per hour. One other individual, Mike Santosuosso was hired at $10 per hour after making $18 per hour as a manager of his own business; however, the evidence reflects that he took a job with the Company on a temporary basis.

[19] Robert Curtin was hired at $6 per hour after making $6.64 per hour; Natalie Blare was hired at $6.50 per hour after making $7 per hour; and Doug Warner and Tab Snider did not take any pay cut. All four employee nevertheless left employment with the Company.

[20] The argument loses sight of the fact that Crumbley and Embrescia noted on their applications that their wage preferences were "open" or "negotiable."

am not convinced, however, that it was the reason that the Company decided to select Gelski, an electrician with relatively less training and experience, over Crumbley and Embrescia, two well-qualified and experienced electricians or that the Company's decision would have been the same in the absence of union animus.

The same is true with respect to Lemin, who had no personal recommendation. He scored the same as Crumbley on the electrical test and his work history was only slightly better than Crumbley and Embrescia (he worked two jobs in the prior 2-year period). His application, however, did not reflect the extent of experience possessed by Crumbley and Embrescia individually.

Accordingly, I find that the Company's reasons for not hiring Crumbley and Embrescia are pretextual. Had it not been for their union affiliation both individuals would have been hired. I, therefore, find that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire Crumbley and Embrescia.

(2) Jerry Gershen

Jerry Gershen scored higher than any other applicant on the electrical test (17 of 19). He had completed high school, a 4-year apprenticeship program, had a fire alarm license, and, at the time of application, had 21 years' experience as a journeyman electrician, more than any other applicant. Gershen's work history was the same as that of Gelski (three jobs in the last 2 years) and he was last paid the union wage rate of $23.45. His application notably listed a 4-year apprenticeship with IBEW, Local 38 and that he attended Max S. Hayes Trade School. The Company raises the same defenses with respect to Gershen that were raised with Crumbley and Embrescia. Those argument are no more persuasive with respect to Gershen, who was the best candidate of the three overt union applicants.

In addition to the defenses noted above, however, the Company asserts that Gershen was not hired because at the time of application, his appearance was dishelved and dirty and he had the smell of what seemed to be alcohol on his breath. Lisa Clock testified that when Gershen appeared at the Company's office asking for an application, she initially thought he was a vagrant from the neighborhood. She vividly recalled that Gershen's hair was matted, his clothes were dirty, and he exuded an obnoxious body odor in addition to the smell of alcohol on his breath. Her account of Gershen's appearance was corroborated by Jim Bratsch who observed Gershen filling out the application.

Neither the General Counsel nor the Charging Party denies that Gershen's appearance was anything other than what Lisa Clock had described. Instead, Gershen's own testimony tends to support her description. He stated that prior to going to the Company's office to apply for a job he worked for a few hours at a friend's house doing electrical work. Gershen denied, however, consuming alcohol at any time prior to going to the Company's office. He explained that he had not drunk alcohol since 1992, when he was diagnosed with diabetes. When asked to explain the smell of what seemed to be alcohol on his breath, Gershen said that his doctor had told him that the medication he takes for diabetes might make his breath smell like alcohol, if he skips a meal. While I credit Gershen's testimony that he did not consume alcohol before applying, it stops short of denying that his breath seemed to smell like alcohol. Moreover, Gershen's medical condition does not explain why he appeared unkept and unclean.

The Company was rightfully concerned about Gershen's appearance and odor. As Lisa Clock's credibly explained appearance is important, because the Company does a lot of work in offices and around professional people, who might be offended by someone who looked and smelled like Gershen did when he applied for the job. I find that the Company, therefore, has articulated a legitimate reason for not hiring Gershen; a reason which would have precluded his employment even in the absence of union affiliation. I, therefore, shall recommend that the allegations of refusal to hire with respect to Jerry Gershen be dismissed.

4. The alleged unlawful treatment and discharge of Orin L. Lemin Jr.

Wright Line, supra, 251 NLRB 1083, likewise provides the analytical framework for resolving the allegations pertaining to Orin Lemin. Specifically, the General Counsel must establish protected activity, knowledge, animus or hostility, and adverse action which tends to encourage or discourage protected activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). The burden then shifts to the employer to persuasively establish by a preponderance of evidence that it would have made the same decisions even in the absence of protected activity.

a. *Alleged unlawful treatment between June 1 through July 6, 1994*

Paragraph 7(D) of complaint alleges that "[b]etween June 1, 1994 and August 3, 1994 on various dates Respondent discriminated against its employee Orin F. Lemin by issuing critical appraisals and reprimanding him." Focusing first on the period June 1 through July 6, I find that the General Counsel has not satisfied his initial burden because there is no evidence that the Company knew or had reason to know that Lemin was a union organizer or that he was affiliated with the Union, prior to July 6. Absent evidence of knowledge, the General Counsel cannot prove a critical element of his case for the period June 1 through July 5.

b. *Alleged unlawful treatment between July 6 through August 3, 1994*

There is ample evidence, however, that the Company had knowledge of Lemin's union activity on and after July 6. On that date, Lemin told his coworkers that he was there to organize the unorganized, in the presence of his foreman, Al Conn, who reported the same to the Company's front office. Thereafter, he displayed union stickers on his lunchbox, wore a union T-shirt, and distributed literature about the union wage scale and benefits. He encouraged his coworkers to visit the union hall and talked up the Union with anyone who would listen. He also picketed two projects which is more fully discussed, infra.

In addition to the various indicia of animus discussed in connection with the refusal to hire Crumbley, Embrescia, and Gershen, there is evidence of animus specific to Lemin. For example, after Lemin picketed the B. F. Goodrich project on July 15, he was transferred to Apex Box for 1 day, then to Industrial Plastics for a couple of days, and then finally to Alcon Industries. In the course of approximately 1 week, im-

mediately following the picketing, he was transferred between three jobsites. In contrast, during the first month of his employment, and before he revealed his union affiliation, he worked only two jobs: Baldwin-Wallace and B. F. Goodrich. Lemin credibly testified that after July 15, he was not told where to report until the morning of his assignment. This evidence supports a reasonable inference that the Company moved Lemin around in an effort to reduce the chance of further picketing.[21] Cf. *New Process Co.*, 290 NLRB 704, 723 (1988).

Animus can also be inferred from the remarks of Foreman Dave Gunsalus. In his testimony, Lemin said that Gunsalus seemed to go out of his way to find fault with his work.[22] In the presence of the other employees, he then would attribute Lemin's shortcomings to the inadequate skills of union trained electricians. After having observed both Lemin and Gunsalus at the hearing, and having listened to them testify about their interaction with each other, I am convinced that at least part of the comments that Lemin described can be attributed to the personal dynamics between these two individuals, and not Lemin's union affiliation. On the other hand, Gunsalus' remarks, which he did not rebut, convey an unmistakable animus by a foreman toward the Union, which was communicated in the presence of the employees.

The General Counsel, as well as the Charging Party, also argues that the timing of events tends to support an inference of animus. He asserts that after Lemin revealed his union affiliation he was verbally reprimanded by Conn for leaving wires uncapped, he was given a written reprimand for supposedly entering a restricted area, and he was given a less than satisfactory 30-day evaluation. After picketing the jobsite on July 15, Lemin was moved around and after picketing on August 3, he was laid off and eventually discharged. While this evidence in and of itself might not be sufficient to satisfy the General Counsel's requisite burden, in the aggregate it does make it more likely than not, that the Company's conduct was motivated by animus.

Considering all of the above, I find that the General Counsel has satisfied his initial burden of persuasively proving knowledge, animus, and adverse action which tends to discourage protected activity. The Company now must show by a preponderance of evidence that Lemin's work performance would have received the same scrutiny and that he would have been laid off and ultimately discharged even absent his union activity.

c. *The Company's affirmative defenses*

Several important factors tend to counterbalance the General Counsel's assertions that after he revealed his union affiliation, Lemin was "put under a microscope" by the Company, who "seized upon any and every opportunity to adversely criticize him." First, a legitimate reason existed for closely reviewing his work, that is, Lemin was a probationary employee which necessarily meant his work performance would be subjected to careful review. The purpose of a probationary period is to train an employee and to evaluate his performance, which the Company was entitled to do, regardless of Lemin's union affiliation. Also important is the fact that Lemin was hired as a journeymen electrician, which meant that he would be evaluated, and expected to perform, as an experienced electrician. Next, the evidence establishes that Lemin went out of his way to draw attention to himself by repeatedly asking for a pay raise, even though he was told during his interview, and several times afterwards, that he would not be considered for a raise until after his 30-day review. Lemin, therefore, placed himself under increased scrutiny.

Finally, the evidence establishes that, even before Lemin revealed his union affiliation, the Company had placed him on notice that his work and his attitude were less than satisfactory. Of signficance are the conversations that Lemin had with Bratsch and Al Conn during the first week of July. On July 5, Lemin called Bratsch to inquire again about getting a pay raise. According to Lemin's daily log, Bratsch said, "I wouldn't be getting my raise until I started doing more work. My foremen had told him I needed prodding to finish my work. He did not say I would be laid off because of this report from Al Conn. He said he would hold any raises contingent on my work improving." Early the next morning, when Lemin arrived at work on the B. F. Goodrich project, he approached Foreman Conn to ask about the comments that Conn had made to Bratsch about Lemin's work. According to Lemin's daily log, Conn said, "If I want more money that [I] should improved my attitude. I asked him this two times to make sure that I would not be getting laid off or fired because of previous comments. At this time I had not disclosed that I was a union member. This conversation took place at 7:20 a.m. till 7:30 a.m. 7–6–94." Thus, contrary to the impression that the General Counsel seeks to foster, the evidence establishes that even before he revealed his union affiliation, Lemin knew that his work performance was under review and that he had to improve. The cautionary comments that he heard on July 5 and 6, from his supervisors, evidently concerned Lemin enough to prompt him to ask both Bratsch and Conn, more than once, if they planned to lay him off, which would have scuttled the Union's plan to organize the Company, without the Company ever knowing it.

These facts, which are virtually ignored by the General Counsel and the Charging Party, establish a balanced context within which to evaluate the Company's defenses.

(1) Lemin's work performance

The Company asserts that Lemin was the worst probationary employee that it ever employed. While there is little evidence to prove that subjective assertion, there is ample evidence that Lemin's work performance was less than satisfactory in several areas. The first of which was safety: an area identified as needing improvement in Lemin's 30-day evaluation. Coworker John Benusik credibly testified that Lemin left uncapped wires hanging from the ceiling at the B. F. Goodrich job.[23] When Benusik checked the circuit to see if

[21] There is no allegation in the complaint that this particular conduct violated the Act.

[22] Although Gunsalus was critical of Lemin's work, the evidence discloses that his criticism of Lemin was not totally without merit.

[23] The General Counsel and the Charging Party assert that Benusik harbored ill feelings toward the Union because he was not accepted into the Local 38 apprenticeship program and, therefore, his testimony is suspect. Contrary to their assertions, I did not detect any bias in Benusik's testimony. Unlike Chuck Clock, whose rejection by the Union remained vivid in his mind, and who had a lot at stake

it was still powered, he realized that Lemin had shut the power off at the light switch, rather than at the circuit box. According to Benusik, who I credit, anyone up on a ladder could have brushed against the wires, which presented a safety hazard, especially for the carpenters who were suppose to take down the ceiling after the electricians had finished their work. Benusik, therefore, reported the incident to Conn, who confronted Lemin.

Lemin did not deny leaving the wires uncapped or deny that he failed to shut off the power at the circuit breaker. Rather, he sought to downplay the safety hazard by pointing out that he was not written up by his foreman for the incident. In response to a leading question by the General Counsel, Lemin testified that there was nothing unusual about temporarily having wires hanging that way in demolition work. The implication being that this was only a temporary situation which would have been rectified before anyone was injured. No basis exists for such an inference. There is no evidence that the hazard would have been detected by anyone else, had it not been for Benusik or that Lemin planned to return to correct the problem. Moreover, the fact that Lemin was not reprimanded in writing does not mean that his performance was acceptable. Quite the contrary, Lemin's lack of regard for the hazard imposed, which was recognized by both his foreman and coworker, paints a picture of an individual with an "I don't care" attitude, as described by both Conn and Gunsalus.

Remarkably Lemin sought to defend his failure to cap the hanging wires by implying that he was being held to a different standard than an apprentice electrician, who according to Lemin had also committed a safety infraction, but with impunity. Lemin testified that one day he saw a new apprentice begin cutting down a pipe which Lemin knew contained live electrical wires. He said that when he brought it to Conn's attention, he just brushed it off. That Lemin would attempt to explain away his own action by comparing himself to someone with far less experience trivializes his explanation. He is an experienced journeyman, who undertook a task in a manner which exposed himself, his coworkers, and other tradesmen to possible danger. One would expect that Lemin would be treated differently from a new apprentice, who carelessly attempted to cut a pipe, placing only himself in danger.

Equally unpersuasive was Lemin's response to the comment in his 30-day evaluation that he worked too slow. On the written evaluation he wrote that he thought that the comment was "unfair." When asked at trial to explain why, Lemin said that it took him longer to put up pipe because he was given the difficult jobs, which required making bends and cuts. Other workers he said were putting up straight pipe only. On cross-examination, however, it was brought out that the other workers were apprentices, who were given work commensurate with their skill level. No evidence was submitted showing that the work given to Lemin was more difficult than the work given to other journeyman or that he was required to work faster than electricians with similiar skills and experience.

On his 30-day evaluation, Lemin also wrote that "favoritism" was shown to long-time nonunion employees. Asked to explain what he meant, Lemin referred to an incident where he was questioned by Conn about using a back-to-back strapping technique to fasten a pipe to a ceiling. Lemin said that he saw Bob Norfolk, a long-time Clock employee, use the same technique in another room and therefore decided to use it himself. He testified that when he explained that to Conn, he again brushed him off.[24] Lemin's response, however, is really nonresponsive, because it does not explain why he did not follow safety standards or why he worked too slow, the two critical factors addressed in his evaluation.

The General Counsel nevertheless argues that the 30-day evaluation is suspect, because it was not given to Lemin until July 14: several days after he revealed his union affiliation and began organizing. I do not agree. The evaluation is consistent with what Bratsch and Conn told Lemin on July 5 and 6 before he disclosed his union affiliation, which was, he had to work faster and improve his attitude if he wanted to get a pay raise. Also, I am persuaded by the evidence that the evaluation was written on July 6, even though it was not presented to Lemin until July 14, because it does not mention that Lemin entered a restricted area on July 8, which would have been one more legitimate reason to deny Lemin a pay raise. Finally, and as noted above, the evidence tends to show that the comments pertaining to the uncapped wires and his work rate were warranted.

Finally, the General Counsel argues that Bratsch's statement in the evaluation that Lemin's work rate was considered to be slower than the "industry standard," was unjustified because Bratsch admitted there is no industry standard. I accept Bratsch's explanation that his statement was a poor choice of words for what he really meant to say was that Lemin worked at a slower pace than he considered to be the journeyman standard. Lemin did not deny that he was slower than other journeymen electricians nor does the evidence shows that he was given more difficult and time-consuming work than other journeyman.

Lemin's failure to stay out of a restricted area on July 8 is another example of his lack of regard for safety. After being told in a morning safety meeting that the building next door was restricted, Lemin was seen by Conn a short time later entering and leaving the restricted area. Although Lemin reluctantly conceded that everyone was told in the safety meeting to stay out of the area, he denied entering the building and implied that he was not in the restricted area. According to him, he was outside the building talking to a friend. Lemin's testimony is not credible and is contradicted by his own daily log. It states, "got written up by my foreman Al Conn for visiting Harrington in a restricted area. Whoppee do." Lemin signed the written warning without any objection. When asked if he agreed with what was written in the warning, Lemin evaded the question stating that

if the Company became organized, Benusik had no incentive to be less than forthright.

[24] The General Counsel and the Charging Party also argue that Lemin was criticized for trivial things such as using the back-to-back strapping technique and for hanging conduit in an unaesthetic manner. While that is true, there is no evidence that Lemin was disciplined or officially reprimanded for these infractions or that any other action was taken against him. Rather, it was Lemin himself who raised these incidents at the hearing when responding to questions about other more serious infractions. In other words, Lemin set up these strawmen in order to deflect attention from the more serious infractions referenced in his 30-day evaluation and written reprimand.

he did not want to start a big argument so he just signed it. The fact that Lemin did not take issue with the written warning at the time he received it suggests that he knew it was warranted. I note parenthetically that the comment he wrote in his daily log "whoppee do" further reflects an "I don't care" attitude.

Similar concerns, noted at the Industrial Plastics project, raise additional questions about Lemon's ability to satisfactorily perform at the journeyman level. According to the unrebutted testimony of Gunsalus, Lemin was asked to place wires in an electrical cabinet, but declined saying that he was not confident that he could perform the task correctly. Gunsalus also testified that Lemin had installed circuit breakers out of order and an electrical outlet upside down only a few days before. Lemin said he did not recall ever being told that he had incorrectly installed the circuit breakers or that he had installed the outlet upside down. He speculated, however, that if the latter were true it was because that is the way the Union trains its apprentices to install outlets, upside down. Having observed Lemin testify at trial, I am skeptical about his selective inability to remember these matters, and I am unpersuaded by his explanation for why the electrical outlet would have been installed upside down. For demeanor reasons, I credit Gunsalus' testimony on these points.[25] Finally, Lemin also conceded having difficulty making a 4-point saddle bend with pipe, but said that two men were needed to properly bend the pipe and that he was left alone to do the job. Gunsalus refuted Lemin's assertion stating that the machine that Lemin was using to make the bends was a one-man machine and that he was able to bend the pipe himself after several unsuccessful tries by Lemin. I credit Gunsalus' testimony over Lemin.

Accordingly, I find that the Company's critical appraisals of Lemin's work and the reprimand that he received between June 1 and August 3, 1994, were due to his less than satisfactory work performance and poor attitude. I further find that the Company's action would have been the same in the absence of Lemin's union affiliation. I, therefore, shall recommend that the allegations that the Company violated the Act between June 1 and August 3, 1994, by discriminating against Orin Lemin by issuing critical appraisals and reprimanding him, be dismissed.

(2) Lemin's layoff

The evidence also establishes that Lemin was laid off for reasons totally apart from his union affiliation. It is not disputed that once removed from the Alcon project, the Company was not allowed to return to finish the job. Rather, the work was completed by in-house electricians and another small electrical contractor. The loss of work, therefore, contributed to the layoff. It is also not disputed that Lemin was not qualified to perform the next available assignment which required a fire alarm license because he did not have such a license. No evidence was submitted showing that other work was available which Lemin was qualified to perform. Finally, the undisputed evidence establishes that Dean Bratsch, the foreman on the Alcon project also was laid off after the Company was removed from the job. I, therefore, find that the reasons for Lemin's layoff are not pretextual and that he would have been laid off in the absence of union affiliation.

Accordingly, I shall recommend that the allegations that the Company violated the Act on or about August 3, 1994, by laying off Orin Lemin be dismissed.

(3) The discharge of Lemin

The Company argues, and the evidence shows, that Lemin was discharged because he entered a restricted area at Alcon Industries, after being told by the human resource director that the area was off limits, and because of his past poor performance, particulary with respect to safety, during his probationary period. Regarding the former, Kay Mullins, human resource director, for Alcon Industries testified that she twice told Lemin to leave a restricted area and was even more suprised to find him there a second time because all Clock Electric employees had been told to leave the premises. Mullins credibly testified that the area was clearly marked as limited to Alcon employees and that in accordance with past practice and procedure no contractor employee was allowed to enter such area without being accompanied by an Alcon employee. Lemin denied that he was in a restricted area and further denied that the matter was brought to his attention. For demeanor reasons, I credit the testimony of Mullins, who was sufficiently irked by Lemin's conduct to prohibit the Company from finishing the job and to write a letter to the Company complaining about Lemin.

As to Lemin's work performance, which has been more fully discussed above, there is additional evidence which shows that Lemin was treated the same as nonunion employees, both probationary and regularly employed, who had been discharged for poor safety practices and poor productivity. The evidence shows that electricians Andy Kuhn and Chuck Bailey, as well as a few helpers, were discharged during their probationary periods. William Flick, a journeyman electrician, and certain helpers were likewise terminated after completing their probationary periods. This evidence establishes that the Company would have discharged Lemin for the same reason in the absence of union affiliation.

I, therefore, shall recommend that the allegation that the Company violated the Act by discharging Lemin be dismissed.

5. The alleged violation of Section 8(a)(4)

Paragraph 10 of the complaint essentially alleges that by discharging Orin Lemin on August 23, 1994, the Company discriminated against employees for giving an affidavit in support of the charges underlying the complaint in violation of Section 8(a)(1) and (4) of the Act. Nowhere in their respective briefs do the General Counsel and the Charging Party argue any facts or marshall any evidence in support of this allegation, nor is there any evidence in the record which supports a violation. Accordingly, I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[25] I am also unpersuaded by the General Counsel's argument that Gunsalus disliked the Union because he, like Bensalus, was not accepted into the union apprenticeship program. Even though he was very critical of Lemin's work, I found him to be very credible.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By photographing Orin L. Lemin Jr. on the picket line, the Respondent violated Section 8(a)(1) of the Act.

4. By refusing to hire Richard Crumbley and James Embrescia, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent failed or refused to hire Richard Crumbley and James Embrescia in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately offer these individuals employment at rates paid electricians hired by the Respondent with commensurate experience; if necessary, terminating the service of employees hired in their stead, and to make them whole for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Clock Electric, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing employees engaged in protected activity.

(b) Failing or refusing to hire job applicants because of their known or suspected membership in and/or support of International Brotherhood of Electrical Workers, Local No. 38, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the existence of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer immediate employment to Richard Crumbley and James Embrescia at rates paid to electricians hired by the Respondent with commensurate experience; if necessary terminating the service of employees hired in their stead.

(b) Make whole Richard Crumbley and James Embrescia for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them in the manner prescribed in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its offices in Cleveland, Ohio, and at all jobsites within a 75-mile radius of Cleveland, Ohio, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 21, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT photograph employees engaged in lawful protected activity.

WE WILL NOT fail or refuse to hire job applicants because of their known or suspected membership in and/or support of International Brotherhood of Electrical Workers, Local No. 38, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer immediate employment to Richard Crumbley and James Embrescia, at rates paid to electricians hired by us with commensurate experience; if necessary, terminating the service of the employees hired in their stead.

WE WILL make Richard Crumbley and James Embrescia whole for any wage or benefit losses they may have suffered by virtue of our unlawful failure or refusal to hire them because of their known or suspected membership in or support of Local No. 38, less any net interim earnings, plus interest.

CLOCK ELECTRIC, INC.